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No. 08-822

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SCOTT A. McLAUGHLIN,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

BRIEF ON BEHALF OF LEGAL ACADEMICS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Sixth Amendment's jury trial guarantee requires that evaluation of aggravating and mitigating circumstances, i.e. culpability determinations, during the penalty phase of a capital trial be found by a unanimous jury beyond a reasonable doubt.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF CITED AUTHORITIES iv

STATEMENT OF INTEREST 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 4

I. This Court Should Grant *Certiorari* to Resolve Whether the Sixth Amendment Requires Capital Sentencing Determinations to Be Made By a Jury Based on Proof Beyond a Reasonable Doubt 4

A. The Court has Yet to Fully Address the Extent of the Jury Trial Guarantee During the Penalty Phase of Capital Trials 6

B. The Court's Cases Do Not Sufficiently Address the Interplay Between the Sixth and Eighth Amendments in Capital Sentencing Proceedings 9

Contents

Page

C. *Apprendi* Requires Culpability Determinations be Made by a Jury Based on Proof Beyond a Reasonable Doubt 13

Conclusion 16

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES:

Apprendi v. New Jersey, 530 U.S. 466 (2000) .... *passim*

Atkins v. Virginia, 536 U.S. 304 (2002) 11

Blakely v. Washington, 542 U.S. 296 (2004) 6

Cunningham v. California, 549 U.S. 270 (2007) 6, 13

Gregg v. Georgia, 428 U.S. 153 (1976) 14

Maynard v. Cartwright, 486 U.S. 356 (1988) ... 11

Oregon v. Ice, 2009 U.S. LEXIS 582 (Jan. 14, 2009) 6, 13, 16

Ring v. Arizona, 536 U.S. 584 (2002) ..... *passim*

United States v. Mitchell, 502 F.3d 931 (9th Cir. 2007) 9

Walton v. Arizona, 497 U.S. 639 (1990) 5, 12, 13

Woodson v. North Carolina, 428 U.S. 280 (1976) 13, 14

Cited Authorities

Page

STATE CASES:

Olsen v. State, 67 P.3d 536 (Wyo. 2003) 8

Ritchie v. State, 809 N.E. 2d 258 (Ind. 2004) ... 9

State v. Anderson, La. LEXIS 1744 (La. Sept. 9, 2008) 9

Woldt v. People, 64 P.3d 256 (Colo. 2003) 8

STATUTES:

ARK. CODE § 5-4-603 8

KAN. STAT. ANN. § 21-4624 8

OHIO REV. CODE § 2929.03(D) 8

TENN. CODE ANN. § 39-13-204(g)(1)(B) 8

UTAH CODE ANN. § 76-3-207(5)(b) 8

WASH. REV. CODE § 10.95.060(4) 8

Cited Authorities

Page

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Model Penal Code § 210.6 cmt. 7 (1981) 12, 15

Model Penal Code § 210. 6(2) (1981) 15

Model Penal Code § 210.6(3)(b) (1981) 15

Model Penal Code § 210.6(4)(a) (1981) 15

STATEMENT OF INTEREST

Amici curiae submit this brief in support of Petitioner and assert that the Sixth Amendment's jury trial guarantee requires that evaluation of aggravating and mitigating circumstances, i.e. culpability determinations, during the penalty phase of a capital trial be found by a unanimous jury beyond a reasonable doubt.[1]

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SUMMARY OF THE ARGUMENT

Across the country, defendants are being sentenced to death absent the jury trial right guaranteed by the Sixth Amendment and the procedural protections required by the Eighth Amendment. In particular, several states permit judges to assess whether a defendant is culpable enough to warrant a death sentence — the most drastic and irreversible form of punishment. Even states that allow capital sentencing juries to make culpability determinations may not require that those decisions be based on proof beyond a reasonable doubt. As a consequence, the current death penalty decision-making structure undermines the jury trial guarantee as set forth in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002). The time is ripe for the Court to clarify whether this immutable right encompasses culpability determinations made during capital sentencing proceedings.

In *Apprendi*, the Court held that a unanimous jury must find beyond a reasonable doubt any fact that increases punishment beyond the statutory maximum. 530 U.S. at 476. In *Ring*, the Court applied the *Apprendi* rule to capital sentencing proceedings and held that a unanimous jury must find beyond a reasonable doubt any aggravating circumstances that make a defendant death-penalty eligible. 536 U.S. at 609. Hinting at an interplay between the Sixth and Eighth Amendments,

the Court explained that the jury trial guarantee applies to any findings required by the Eighth Amendment as a condition of capital punishment. *Id.* Instructively, the Model Penal Code recognizes that when culpability is premised on the presence or absence of a mitigating circumstance, such determinations are the functional equivalent of finding an aggravating circumstance as addressed in *Ring*, and must be made before a defendant can be sentenced to death. Accordingly, the Court should make explicit the logical implication of *Ring* and hold that the jury trial guarantee encompasses culpability determinations which similarly make a defendant death-penalty eligible.

In conclusion, the time has come for the Court to address the constitutionality of statutes that permit a judge to supplant the dominant role of the jury during capital sentencing proceedings. In doing so, the Court must preserve the jury's function "as the great bulwark against the state and the accused."

ARGUMENT

I. This Court Should Grant *Certiorari* to Resolve Whether the Sixth Amendment Requires Capital Sentencing Determinations to Be Made By a Jury Based on Proof Beyond a Reasonable Doubt

The Court's Sixth Amendment jurisprudence makes clear that all findings that operate to increase a defendant's punishment beyond the statutory maximum must be found by a jury beyond a reasonable doubt. Whether this jury trial guarantee extends to determinations concerning mitigating circumstances,

i.e. culpability determinations, remains an open but important question. Justice Stevens, dissenting in *Walton v. Arizona*, 497 U.S. 639 (1990), observed that:

> If this question had been posed in 1791, when the Sixth Amendment became law, the answer would have been clear. By that time, "the English jury's role in determining critical facts in homicide cases was entrenched. As fact-finder, the jury had the power to determine not only whether the defendant was guilty of homicide but also the degree of the offense. Moreover, the jury's role in finding facts that would determine a homicide defendant's eligibility for capital punishment was particularly well established. Throughout its history, the jury determined which homicide defendants would be subject to capital punishment by making factual determinations, many of which related to difficult assessments of the defendant's state of mind. By the time the Bill of Rights was adopted, the jury's right to make these determinations was unquestioned.

Walton, 497 U.S. at 710-711 (Stevens, J., dissenting) (citation omitted). The capital sentencing procedures in some jurisdictions, however, fail to account for the pivotal role of the jury envisioned by the Framers.

The Missouri statute pursuant to which the trial court sentenced Scott McLaughlin to death permits a judge to supplant the constitutionally paramount role of the jury if that jury's culpability decision is less than

unanimous. Amici remain concerned – to paraphrase Justice Scalia, concurring in *Ring v. Arizona*, 536 U.S. 584, 611 (2002) – that "decline" for the "veneration" of the Sixth Amendment right to a jury trial "is bound to be confirmed, and indeed accelerated, by the repeated spectacle of a man's going to his death because a judge," rather than a jury, made those factual determinations.

The Court should grant *certiorari* to resolve confusion over the extent of the jury trial guarantee and assess whether capital sentencing statutes like Missouri's are unconstitutional.

A. The Court has Yet to Fully Address the Extent of the Jury Trial Guarantee During the Penalty Phase of Capital Trials

In *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000), this Court held that the Sixth Amendment right to a jury trial and the Due Process Clause of the Fifth and Fourteenth Amendments require that a unanimous jury find beyond a reasonable doubt any facts that increase punishment beyond the statutory maximum. *See also Cunningham v. California*, 549 U.S. 270, 274 (2007) (holding that a jury, rather than a judge, must evaluate facts that expose a defendant to an elevated sentence); *Blakely v. Washington*, 542 U.S. 296 (2004) (holding that a "deliberate cruelty" determination must be found by a jury beyond a reasonable doubt because it subjects a defendant to a greater sentence). The Court examined the historical role of the jury and fashioned a rule that preserves the jury's function "'as the great bulwark'" between the state and the accused. *Apprendi*, 530 U.S. at 477 (citation omitted); *see also Oregon v. Ice*, 2009

U.S. LEXIS 582, at *14 (Jan. 14, 2009) (affirming that the extent of the jury trial guarantee turns on the jury's historic role). Justice Scalia, concurring in *Apprendi*, noted the intrinsic link between guilt and punishment, and agreed that both determinations must be made by a jury beyond a reasonable doubt. *Apprendi*, 530 U.S. at 498 ("[G]uilt of the crime (and hence the length of the sentence to which [a defendant] is exposed) will be determined *beyond a reasonable doubt by the unanimous vote of 12 of his fellow citizens*.") (Scalia, J., concurring) (emphasis in original).

While the Court stated in *Apprendi* that its holding did not extend to capital proceedings, *id.* at 496, it reversed course two years later and held that a jury must find beyond a reasonable doubt any aggravating circumstances that make a defendant eligible for the death penalty. *Ring*, 536 U.S. at 609. Though *Ring* applied *Apprendi* to a portion of capital sentencing proceedings, it left unresolved whether the jury trial guarantee applied to determinations beyond the finding of aggravating circumstances. *Id.* at 597 n.4. It did not address, for example, whether culpability determinations must be found by a jury beyond a reasonable doubt. Importantly, the Court did not preclude *Ring's* extension to culpability determinations, and indeed, Justice Scalia's concurring opinion hinted at a broader application. *Id.* at 610 (Scalia, J., concurring) ("[A]ll facts essential to the imposition of the level of punishment that the defendant receives . . . must be found by the jury beyond a reasonable doubt.").

Absent guidance, state and federal courts are divided over the extent of *Ring*'s holding, and, in

particular, the burden of proof required for capital sentencing determinations. Some courts mandate that all capital sentencing determinations be proven by the state beyond a reasonable doubt. *See Woldt v. People*, 64 P.3d 256, 265 (Colo. 2003) (en banc) (a jury — rather than a three-judge panel — must "be convinced beyond a reasonable doubt that any mitigating factors d[o] not outweigh the proven statutory aggravating factors."); *Olsen v. State*, 67 P. 3d 536, 590 (Wyo. 2003) ("If the jury is to be instructed to 'weigh'[,] . . . the burden of negating this mitigating evidence by proof beyond a reasonable doubt remains with the State.").[2]

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[2] *See also* OHIO REV. CODE § 2929.03(D) ("jury [must] unanimously find[], by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors"); ARK. CODE § 5-4-603 ("jury shall impose sentence of death if [it] unanimously returns written findings that . . . [a]ggravating circumstances outweigh beyond a reasonable doubt all mitigating circumstances found to exist . . ."); TENN. CODE ANN. § 39-13-204 (g) (1) (B) ("The sentence shall be death, if the jury unanimously determines that [an aggravating] circumstance or circumstances have been proven by the state to outweigh any mitigating circumstances beyond a reasonable doubt."); UTAH CODE ANN. § 76-3-207 (5) (b) ("The death penalty shall only be imposed if . . . the jury is persuaded beyond a reasonable doubt that total aggravation outweighs total mitigation, and is further persuaded, beyond a reasonable doubt, that the imposition of the death penalty is justified and appropriate in the circumstances."); WASH. REV. CODE § 10.95.060 (4) (jury must be "convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency"); KAN. STAT. ANN. § 21-4624 (death penalty not imposed unless "by unanimous vote, the jury finds beyond a reasonable doubt . . . that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist . . .").

Other courts hold that *Ring* does not require the prosecution to bear any burden at all, much less a heightened burden, on issues other than aggravating circumstances. *See United States v. Mitchell*, 502 F.3d 931, 993 (9th Cir. 2007) (explaining that the beyond a reasonable doubt standard does not apply at the weighing stage); *State v. Anderson*, 2008 La. LEXIS 1744, *103 (La. Sept. 9, 2008) ("neither *Ring*, nor Louisiana jurisprudence for that matter, require the jurors to reach their ultimate sentencing determination beyond a reasonable doubt."); *Ritchie v. State*, 809 N.E. 2d 258, 268 (Ind. 2004) ("The outcome of weighing is . . . . not required to be found by a jury under a reasonable doubt standard."). Accordingly, in order to guide the courts and legislatures, this Court should grant *certiorari* to clarify the scope of the *Apprendi* and *Ring* decisions.

B. The Court's Cases Do Not Sufficiently Address the Interplay Between the Sixth and Eighth Amendments in Capital Sentencing Proceedings

In *Apprendi*, this Court addressed the question of whether the defendant had "a constitutional right to have a jury find [a fact] on the basis of proof beyond a reasonable doubt":

> Our answer to that question was foreshadowed by our opinion in *Jones v. United States* . . . [where] [w]e . . . noted that under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior

> conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.

Apprendi, 530 U.S. at 476 (internal citation omitted); *see also id.* at 478:

> Equally well founded is the companion right to have the jury verdict based on proof beyond a reasonable doubt. "The demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, [though] its crystallization into the formula 'beyond a reasonable doubt' seems to have occurred as late as 1798."

(Citation omitted).

In *Ring*, the Court hinted that capital sentencing proceedings implicate both the Sixth and Eighth Amendments. The Court held that the Sixth Amendment applies to elements of the offense that are constitutionally required such as the "factfinding necessary to put [a defendant] to death." *Ring*, 536 U.S. at 609. The Court explained that aggravating factors "operate as 'the functional equivalent of an element of a greater offense,'" and thus, must be found by a jury. *Id.* (quoting *Apprendi*, 530 U.S. at 494, n. 19); *see also Apprendi*, 530 U.S. at 494 (The dispositive question "is one not of form but of effect.").

Turning to the Eighth Amendment, the Court reasoned that consideration of aggravating

circumstances furthers the goal of prohibiting cruel and usual punishment. *Id.* at 607 (quoting *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988)) ("[O]ur cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action."). The Court also noted that "the great majority of States responded to the Court's Eighth Amendment decisions requiring the presence of aggravating circumstances in capital cases by entrusting those determinations to the jury." *Id.* at 607-608. By surveying legislative decisions authorizing jury factfinding in capital sentencings, *Ring* implicitly invokes the Eighth Amendment's "evolving standards of decency," *Atkins v. Virginia*, 536 U.S. 304, 311 (2002), thus suggesting that the Eighth Amendment requires a jury during capital sentencing proceedings. *See* Bryan A. Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing*, 54 Ala. L. Rev. 1091, 1140-45 (2003). This reasoning also stands apart from an analysis of the historical role of the jury, the dispositive inquiry under the Sixth Amendment. At the very least, *Ring* suggests that the jury trial guarantee applies to particular findings that are required by the Eighth Amendment, regardless of whether these findings traditionally fell within the province of the jury.[3]

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[3] In *Ring*, the Court did acknowledge that by the time of the Bill of Rights, a jury considering the death penalty "unquestionably" had the right to make "factual determinations, many of which related to difficult assessments

(Cont'd)

Further adding to *Ring*'s muddied distinction between the Sixth and Eighth Amendments, Justice Breyer concluded that "the Eighth Amendment requires that a jury, not a judge, make the decision to sentence a defendant to death." *Ring*, 536 U.S. at 614-15 (Breyer, J., concurring). *See also Atkins*, 536 U.S. at 324 (Rehnquist, C.J., joined by Scalia and Thomas, J.J.) (explaining that a capital sentencing jury functions as "objective indicia of contemporary values" and an "indicator[] by which courts ascertain the contemporary American conceptions of decency for purposes of the Eighth Amendment").

Therefore, the Court should grant *certiorari* in order to clarify which constitutional protections apply during capital sentencing proceedings — the Sixth Amendment's immutable right to a jury trial, the Eighth Amendment's standards of decency, or both.

(Cont'd)

of the defendant's state of mind." 536 U.S. at 599 (quoting *Walton*, 497 U.S. at 710-11 (1990) (Stevens, J., dissenting)). Moreover, the Model Penal Code observes that "[t]he practice of court imposition of the death penalty without jury participation has little precedent in the American experience" and that "many judges would oppose this new responsibility, as English judges consistently have." Model Penal Code § 210.6 cmt. 7 (1981).

C. *Apprendi* Requires Culpability Determinations be Made by a Jury Based on Proof Beyond a Reasonable Doubt

Where a statutory scheme sets the maximum available punishment for first degree murder at life without the possibility of parole, absent a unanimous jury finding that the death penalty is appropriate, *Apprendi* should apply. If the *Apprendi* rule encompasses factfinding that exposes a defendant to the death penalty, as *Ring* reasons, then culpability determinations are also subject to the jury trial guarantee because they similarly expose a defendant to a death sentence. Indeed, under *Cunningham*, the *Apprendi* rule applies to determinations concerning both the offense as well as the moral culpability of the offender. 549 U.S. at 291 n. 14 (rejecting a distinction between facts concerning the offense and facts concerning the offender). Like aggravating factors, culpability determinations constitute "factfinding necessary to put a defendant to death." *Ring*, 536 U.S. at 609. Mitigating circumstances are designed to prevent the arbitrary imposition of the death penalty by narrowing the class of death-eligible defendants, as required by the Eighth Amendment. *See Walton*, 497 U.S. at 666 (Scalia, J., concurring) (describing the narrowing function of both aggravating and mitigating factors as "impossible" to distinguish); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). Moreover, a death sentence cannot be imposed unless aggravating circumstances exist *and* the defendant is found culpable enough to merit the most extreme form of punishment. *See Ice*, 2009 U.S. LEXIS 582, at *24 (Scalia, J., dissenting) (If "a State makes an increase in a

defendant's authorized punishment contingent on the finding of a fact, that fact - no matter how the State labels it – must be found by a jury beyond a reasonable doubt.") (citation omitted); *Woodson*, 428 U.S. at 305 ("[T]he Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."). Accordingly, a fair reading of *Ring* suggests that the Sixth Amendment jury trial guarantee applies to culpability determinations insofar as they constitute factfinding required by the Eighth Amendment. *See Ring*, 536 U.S. at 589 ("Capital defendants, no less than non-capital defendants, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.").

The Model Penal Code has guided many states in formulating their post-*Furman* death penalty procedures, and this Court has identified the code as an example for states to follow. *See Gregg v. Georgia*, 428 U.S. 153, 194-95 (1976) (approving of the Model Penal Code's bifurcated capital sentencing proceeding, which provided "information relevant to the imposition of sentence and standards to guide its use.")[4] Notably, the code treats aggravating and mitigating circumstances

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[4] *See also* Margery Malkin Koosed, *Defense Strategies in Death Penalty Litigation: Averting Mistaken Executions by Adopting the Model Penal Code's Exclusion of Death in the Presence of Lingering Doubt*, 21 N. Ill. U. L. Rev. 41, 49 (2001) ("Many jurisdictions looked to the Model Penal Code when death-sentencing statutes around the country were struck down in the wake of . . . *Furman v. Georgia*.").

as functional equivalents, requiring a judicial body to make a legal determination on both issues at the same time and *before* it can impose any penalty of death. Model Penal Code § 210.6(2) (1981) ("The Court . . . and the jury . . . shall not impose or recommend [a] sentence of death unless it finds one of the aggravating circumstances . . . and further finds that there are no mitigating circumstances sufficiently substantial to call for leniency."); *see also* Model Penal Code § 210.6 cmt. 7 ("[The sentencing] proceeding will call for a balance of aggravating and mitigating factors and will not permit the imposition of a sentence of death unless an aggravating circumstance . . . has been found *and* no overriding mitigation is found to exist."). Further, the structure of the code treats aggravating and mitigating factors as parallel and equal determinations, listing both eight aggravating factors and eight mitigating factors and conceptually linking the factors. For instance, the code lists the presence of a criminal history as an aggravating factor while the absence of such a history is a mitigating factor. Model Penal Code § 210.6(3)(b), 4(a). Under the code, aggravating and mitigating factors are inextricably linked in so far as they are both essential to the decision to increase a defendant's punishment to death.

Thus, under *Apprendi* and guidance from the Model Penal Code, the jury's determination of moral culpability based on the presence or absence of a mitigating circumstance has the same significance as the jury's finding of an aggravating circumstance. Both determinations are essential to a culpability determination and thus serve to make a defendant eligible for the death penalty. Accordingly, culpability

determinations must be found by a jury based on proof beyond a reasonable doubt. "We long ago made clear that the [jury trial] guarantee turns upon the penal consequences attached to the fact, and not to its formal definition as an element of the crime." *Ice*, 2009 U.S. LEXIS 582, at *24 (Scalia, J., dissenting) (citation omitted). Therefore, the Court should grant *certiorari* in order to consider extending *Apprendi's* reach to culpability determinations.

CONCLUSION

For the reasons stated above, *amici* respectfully submit that the Court grant the petition for *certiorari*.

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